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INTELLECTUAL PROPERTY ALERT

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Ownership of Ideas in the Virtual World

By James R. Meyer and Katrin C. Rowan

In *The Social Network*, the award winning movie about the origin of the Internet phenomenon Facebook, screenwriter Aaron Sorkin poses the interesting question (through his somewhat fictionalized depiction of Facebook creator Mark Zuckerberg): "Does a guy who makes a really good chair owe money to anyone who ever made a chair?"

The context of this question was a bitter lawsuit against Zuckerberg by fellow Harvard students who claimed that they shared "their" idea for a social networking website with Zuckerberg, who then stole the idea and created "Facebook."

In 2004, social networking on the Internet was not a new idea; further, Zuckerberg was hard pressed to deny that the "idea" of Facebook was indeed similar to what he discussed with the Harvard students. However, it was Zuckerberg and his friends who wrote original code for the "Facebook" social networking site and developed it into the unprecedented success that it has become. The site has more than 500 million members and was recently valued at $50 billion. The lawsuit ultimately settled for $65 million, and, despite the fact that the consideration given for the settlement is estimated to have increased in value to approximately $140 million, the former Harvard students are asking the courts to undo the settlement.

Similar issues are presented by the ongoing litigation between Hottrix, LLC and The Hershey Company over an iPhone application (known as an "app") that simulates drinking milk. In 2007, application developer Hottrix developed an app for iPhones called iMilk, which allows users to "drink" milk by tilting their phones, and finish with a "burp" when the milk is gone.

Hershey's Director of Technology contacted Hottrix to see if the company was interested in modifying their app to include Hershey's Syrup® to make virtual chocolate milk, and replace the "burp" with a "moo." The parties apparently entered into negotiations to develop such an app, but were unable to reach an agreement.

In 2009, Hershey launched its own app, which allows users to virtually "add" Hershey's Syrup® to the milk, "stir" it in, and "drink" the milk through a straw. The app makes a "slurp" sound when the user is finished with the milk.

The companies are now embroiled in a lawsuit in Pennsylvania which essentially explores the scope of Hottrix's ownership of the idea of filling and drinking a virtual glass of milk. Though iPhone apps that allow users to simulate drinking milk are not necessarily serious stuff, they are, as the judge in the Hershey case put it, "big business by anyone's measuring stick, which explains why the combatants here would bring a dispute involving computer-generated images of milk, chocolate, and syrup to federal court."

As with the defense in the Facebook case, Hershey claims that it independently developed its own code for the app and did not copy any of Hottrix's code. And, although Hershey admits that "both [apps] reflect the *idea* of using an iPhone screen to create a virtual milk drink," it argues that there are "substantial differences in the actual expression" of the idea that are sufficient to exclude the possibility that Hershey intentionally copied the copyrighted code. Hottrix's position is that it does not seek protection for the "idea" of its iMilk app, but rather for the video and software — in other words, for the original expression of this idea — as well as other intellectual property rights.

Under the law of copyright, an *idea, procedure or method of operation* is not protected apart from the *original expression* of that idea. In applying that basic

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principle as early as the mid-19th century, the U.S. Supreme Court overturned a finding of infringement of a copyrighted book that described a new system of bookkeeping and contained forms for implementing the system. A later published book challenged by the copyright owner presented the same idea for the bookkeeping system, but in an original way. The Court stated that the idea of the bookkeeping system could be protected only under the patent law — not the copyright law:

> The copyright of a book on bookkeeping cannot secure the exclusive right to make, sell, and use account books prepared upon the plan set forth in such a book.

This fundamental principle is now embodied in Section 102(b) of the U.S. Copyright Act and remains valid today.

Similarly, the litigants in the Hershey case will be disputing the significance of the differences between drinking virtual milk through a straw versus drinking virtual milk by tipping one's phone as possible alternative original expressions of the same idea.

Whether it is an idea for a really good chair, a social networking website, or software that allows users to pretend that they are drinking milk, the issue of whether the same idea is expressed in a sufficiently original and different way so as to avoid liability for copyright infringement is the same. For Hottrix and Hershey, the line may be drawn between, among other things, a burp and a slurp.

These examples illustrate the difficulty of protecting an idea, especially a commercially valuable one, in our virtual world, where ideas are both easily disseminated and imitated. They also illustrate the importance of consulting counsel early in the development process of any new product or service — whether virtual or tangible. Counsel can assist in discovering pre-existing intellectual property rights that may pose a threat to the commercial viability of a product or service and in obtaining such intellectual property protection as may be available for the product or service. ◆

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